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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-122

VASSER BISHOP, as Executrix of the Estate of David H. Bishop, Deceased, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Mississippi (Pet. App. 35-49) is unofficially reported at 26 A.F.T.R. 2d 5970, and 70-2 U.S.T.C., par. 12,693. The *per curiam* opinion of the court of appeals (Pet. App. 53) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1972. (Pet. App. 54-55.) A petition

for rehearing and for rehearing *en banc* was denied April 26, 1972. (Pet. App. 57.) The petition for a writ of certiorari was filed on July 22, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in affirming *per curiam*, without oral argument, the district court's holdings (a) that the disclaimers executed by Dr. Bishop in 1961 and 1962 constituted taxable gifts of the property disclaimed within the meaning of Sections 2501 and 2511 of the Internal Revenue Code of 1954, and (b) that pursuant to Section 6501(e)(2) of the Code, the six-year statute of limitations applied to the assessment of gift tax deficiencies for 1961 and 1962, since the omitted gifts exceeded 25 percent of the reported gifts in each year.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 2501, 2511 and 6501 of the Internal Revenue Code of 1954, Section 25.2511-1 of the Treasury Regulations on Gift Tax, and Section 301.6501(e)-1 of the Treasury Regulations on Procedure and Administration are set forth in the Appendix, *infra*, pp. 13-17.

STATEMENT

Dr. and Mrs. David H. Bishop, residents of Mississippi, owned various securities and bank accounts

as joint tenants with the right of survivorship. Mrs. Bishop died October 3, 1961 (Pet. App. 35), leaving a holographic will which provided in part (A. 29):[1]

> To my husband, David H. Bishop, I give my entire estate *now in joint ownership* of David H. Bishop and Mary H. Bishop *with right of survivorship*, appointing him executor. (Emphasis added.)

On November 27, 1961, before his wife's federal estate tax return was filed, Dr. Bishop executed a "Disclaimer and Release" in which he attempted to renounce any interest as surviving owner of *some but not all* of the stocks owned jointly with Mrs. Bishop before her death, and to cause them to pass directly to their three daughters, contingent takers under the mother's will. Contemporaneously, Dr. Bishop transferred *other* securities and cash worth $63,000, acknowledged by him to have been held jointly with his wife with right of survivorship, to a trust created that day for the use and benefit of the three daughters and other family members. (Pet. App. 36-37.) Two months later, on January 29, 1962, Dr. Bishop executed a "Disclaimer and Release: Supplement No. One," in which he attempted to renounce and release to his daughters ownership of *some* other stocks formerly held with his wife as joint tenants

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[1] In conformity with the references used in the court of appeals, "A." references are to the record appendix and "R." references are to the numbered pages of the record not included in that appendix.

with right of survivorship. Unlike the original disclaimer, the supplement described the disclaimed property as owned "equally" by them. Contemporaneously with the making of the supplemental disclaimer, Dr. Bishop transferred to the existing trust an additional $27,000 worth of securities formerly held with his wife in joint tenancy with survivorship rights. (Pet. App. 37; Ex. 7, R. 66-67, and statement attached thereto.)

On January 30, 1962, Dr. Bishop filed a federal gift tax return for 1961, including therein the November 27, 1961, transfer to the trust totaling $63,000, but without reference to the attempted disclaimer of ownership of other stocks. (Pet. App. 37-38). Attached to this return was the following statement (R. 70):

> All securities which my wife and I owned at the time of her death, were held by us as joint tenants with the right of survivorship. * * * it was our view that we owned all securities and cash in banks in equal shares.

On February 21, 1962, Dr. Bishop as executor of his wife's estate filed a federal estate tax return listing in Schedule E all securities and bank accounts owned by them as "joint tenants with the right of survivorship." In Schedule M thereto (property qualifying for the marital deduction), Mrs. Bishop's entire estate was listed as having passed to her husband, including those jointly owned securities and cash which he had given to the trust, but excluding those jointly owned assets (about one-half of her gross

estate) ownership of which Dr. Bishop believed to have been disclaimed by him. (Pet. App. 35-36.) [2] After Dr. Bishop's death in 1963, the executrix of his estate filed a federal gift tax return for 1962, reporting his January 29, 1962, transfer to the existing trust of $27,000 worth of securities, but omitting any reference to the securities attempted to be disclaimed by the supplemental disclaimer of that date. (Pet. App. 38.)

On the theory that the disclaimers by Dr. Bishop in 1961 and 1962 constituted unreported taxable gifts within the meaning of Sections 2501 and 2511 of the Code, the Commissioner determined that gift tax deficiencies existed for those years. Although the deficiency assessments were made more than three years after the filing of the gift tax returns, the Commissioner took the position that the six-year rather than the three-year statute of limitations applied, pursuant to the provisions of Section 6501(e)(2) of the Code, because the amounts disclaimed and erroneously omitted from the returns undisputedly exceeded 25 percent of the gifts reported in each of those years. (Pet. App. 38-39.) After payment of the tax, the executrix filed this suit for refund. Both parties moved for summary judgment, and the district court granted the government's cross-motion. (Pet. App. 49-52.) The petitioner appealed to the court of appeals for the Fifth Circuit. After the

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[2] This case concerns only federal gift taxes assessed against Dr. Bishop, now deceased; there is no issue regarding Mrs. Bishop's federal estate tax return.

record had been filed and all briefs submitted, the court of appeals placed the appeal on its summary calendar and denied the petitioner's motion for oral argument. Thereafter, the court of appeals affirmed *per curiam* and denied the petition for rehearing and rehearing *in banc*. (Pet. App. 53-57.)

ARGUMENT

The decision below is correct. There is no conflict of decisions or other reason for further review.

1. The courts below correctly held that no genuine issue of fact existed, and that the government was entitled to judgment as a matter of law. Under Mississippi law, Dr. Bishop's attempted disclaimers of his survivorship interests in the jointly held property were not effective to prevent this property from vesting absolutely in him as survivor. Hence, the disclaimers constituted taxable transfers under Sections 2501 and 2511 of the Code and Section 25.2511-1(c) of the Treasury Regulations on Gift Tax (Appendix, *infra*, pp. 13, 15-16). In Mississippi, joint tenancies with rights of survivorship are valid when appropriate and clear language has been employed in the governing instruments. *Bird* v. *Stein*, 102 F. Supp. 399 (S.D. Miss.), reversed on other grounds, 204 F. 2d 122 (C.A. 5); *Wolfe* v. *Wolfe*, 207 Miss. 480, 42 So. 2d 438; *Vaughn* v. *Vaughn*, 238 Miss. 342, 118 So. 2d 620; *O'Connor* v. *Dickerson*, 188 So. 2d 241. Here, the securities were admittedly registered in the names of the spouses jointly with right

of survivorship, with full knowledge and acceptance of the two co-owners. Nothing in the Bishops' holographic wills or in any other portion of the record shows any agreement or actions by the Bishops that would serve to convert this joint tenancy into a tenancy in common. There is no competent evidence that the spouses owned the property in any manner other than as stated in the stock certificates. Indeed, Dr. Bishop's actions after his wife's death, both individually as surviving owner and as the executor of her estate, clearly indicated his understanding that the entire property vested in him absolutely upon his wife's death.

In the courts below, the executrix argued that even if joint tenancies had been created originally with respect to the Bishops' property, these tenancies were severed and converted into tenancies in common by various actions of the parties during their lifetime. The trial court correctly held (Pet. App. 40) that the only portions of the record of value in determining whether the joint interests were severed were the Bishops' wills, and that nothing therein indicated a sufficient severance. In Mississippi, a joint tenancy with survivorship rights may be terminated by agreement of the parties. *O'Connor* v. *Dickerson*, *supra*, p. 245, citing 20 Am. Jur. 2d, *Cotenancy and Joint Ownership*, Sec. 19, pp. 112-113. Such an agreement is not accomplished, however, by the will of a joint tenant which is revocable during his lifetime and does not take effect until after his death. The petitioner urges (Pet. 23-29) that she was entitled to a jury

trial on the issue whether the Bishops intended to sever the joint ownership of their securities and convert it into a tenancy in common. There is no dispute, however, as to the evidentiary facts, and the question whether the Bishops held the securities as joint tenants with right of survivorship is a question of Mississippi law. The courts below answered that question correctly, and, in any event, their determination as to local law is not appropriate for review by this Court. *Sims* v. *United States*, 359 U.S. 108, 114.

Generally, disclaimers of testamentary gifts are valid and not taxable as gifts (see, *e.g.*, *Brown* v. *Routzahn*, 63 F. 2d 914 (C.A. 6), certiorari denied, 290 U.S. 641), and in a few states disclaimers of intestate gifts may also be valid (cf. 21 Page's Ohio Rev. Code Ann., § 2105.061 with *Hardenbergh* v. *Commissioner*, 198 F. 2d 63 (C.A. 8), certiorari denied, 344 U.S. 836). However, there is no law in Mississippi (or elsewhere, apparently; see *Krakoff* v. *United States*, 439 F. 2d 1023 (C.A. 6)) which gives validity to a disclaimer of the nontestamentary, nonintestate interest acquired by a surviving owner of jointly held property. As the lower courts correctly held (Pet. App. 45, 53), when a joint owner dies, the estate which the survivor held jointly with the decedent ripens into an absolute and unqualified fee for the survivor. *United States* v. *Jacobs*, 306 U.S. 363, 370-371. Absent a decision of the state's highest court to the contrary, the conclusion of the courts below as to the Mississippi law should be accepted

as correct. *Commissioner* v. *Estate of Bosch*, 387 U.S. 456.[3]

2. The lower courts correctly held that the gift tax assessments in question were timely. Under Section 6501(a) of the Code (Appendix, *infra*, pp. 13-14), the Commissioner is generally required to make gift tax assessments within three years after the questioned returns are filed. An exception set forth in Section 6501(e)(2) (Appendix, *infra*, p. 14) permits assessments within six years if gifts allegedly omitted from returns exceed 25 percent of reported gifts. A gift is not considered omitted from a return, however, if "such item is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the [Commissioner] * * * of the nature and amount of such item." It is undisputed in the present case that (1) the amount of the allegedly unreported gifts exceeds 25 percent of reported gifts each year, and (2) the unreported gifts (the disclaimers) were not disclosed in any manner in or with the questioned returns. (Pet. App. 46.) The petitioner contends, however (Pet. 29-31), that the Internal Revenue Service was adequately apprised of

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[3] Reference is made in the disclaimers and in the petition (pp. 6-8, 14-16) to Section 2056(d) of the Internal Revenue Code of 1954 (disclaimers regarding marital deductions in computing federal *estate* taxes) and to certain sections of the Mississippi Code related to releases of powers of appointment. Neither of these statutory references is relevant in determining whether disclaimers constitute taxable gifts under Sections 2501 and 2511 of the Code, as the courts below correctly held. (Pet. App. 45, 53.)

the disclaimers through information furnished to the Internal Revenue Service by petitioner's attorney. The record shows, however, that this information was furnished in connection with the audit of Mrs. Bishop's estate tax return, and, as noted by the courts below (Pet. App. 46-47), the gift tax returns were examined and processed by an agent different from the one processing the estate tax return. The record does not indicate that information with respect to the disclaimers was readily available for use in auditing the gift tax returns. In any event, there was no clue of any nature on either of the gift tax returns, or in any statement attached to either of them, which would adequately apprise the Commissioner of the nature and amount of the omitted items.

In *Colony, Inc.* v. *Commissioner*, 357 U.S. 28, 36-37, this Court stated that the purpose for the extended assessment period is to give the Commissioner additional time "to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors." The Fifth Circuit has repeatedly held that failure to disclose items on the face of a questioned return or in a statement attached thereto places the Commissioner at such "special disadvantage" as to make the extended period applicable. *Phinney* v. *Chambers*, 392 F. 2d 680, 685-686, certiorari denied, 391 U.S. 935; *Taylor* v. *United States*, 417 F. 2d 991; *Cardinal Life Insurance Co.* v. *United States*, 425 F. 2d 1328. Possible imputation of the required knowledge from another return

does not meet the test announced in the decisions. Since notice of the disclaimers was not given in or with the gift tax returns in issue, the denial of the petitioner's motion for summary judgment and the holding that the six-year assessment period applied were entirely proper.

3. The court of appeals placed the petitioner's appeal upon its summary calendar for disposition upon the briefs and record, but without oral argument, pursuant to its Local Rule 18. (Pet. 13.) As the Fifth Circuit has explained, that Rule was adopted in an effort to lighten the burden of the court's extraordinarily heavy docket. A case is placed on the summary calendar only by unanimous action of the assigned panel members, and only when the case is to be disposed of by unanimous consent of such panel. *Murphy* v. *Houma Well Service*, 409 F. 2d 804; *Huth* v. *Southern Pacific Co.*, 417 F. 2d 526; *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of N.Y.*, 431 F. 2d 409.

This Court itself, on appropriate occasions, has disposed of cases on their merits without oral argument. See, *e.g.*, *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4. As this Court's practice and decisions indicate, there is no constitutional right to oral argument if a case is otherwise fully placed before a court for its consideration. *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 274. This same question has been presented previously to this Court regarding the Fifth Circuit's procedure. *Payton* v. *United States*, 425 F. 2d 1324, certiorari

denied, 400 U.S. 957; *Big "D" Development Corp.* v. *Commissioner*, 453 F. 2d 1365, certiorari denied May 22, 1972, No. 71-1216. Full briefs were before the court of appeals in the present case, and the nature of the district court's decision granting summary judgment made this case appropriate for disposition without oral argument.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1972.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C., 1964 ed.):

SEC. 2501. IMPOSITION OF TAX.

(a) *General Rule.*—For the calendar year 1955 and each calendar year thereafter a tax, computed as provided in section 2502, is hereby imposed on the transfer of property by gift during such calendar year by any individual, resident or nonresident, * * *.

* * * * *

SEC. 2511. TRANSFERS IN GENERAL.

(a) *Scope.*—Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *.

* * * * *

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

(a) [as amended by Sec. 165(a), Excise Tax Technical Changes Act of 1958, P.L. 85-859, 72 Stat. 1275] *General Rule.*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceed-

ing in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * * * *

(e) *Omission From Gross Income.*—Except as otherwise provided in subsection (c)—

* * * * *

(2) *Estate and gift taxes.*—In the case of a return of estate tax under chapter 11 or a return of gift tax under chapter 12, if the taxpayer omits from the gross estate or from the total amount of the gifts made during the year items includible in such gross estate or such total gifts, as the case may be, as exceed in amount 25 percent of the gross estate stated in the return or the total amount of gifts stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. In determining the items omitted from the gross estate or the total gifts, there shall not be taken into account any item which is omitted from the gross estate or from the total gifts stated in the return if such item is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary or his delegate of the nature and amount of such item.

* * * * *

Treasury Regulations on Gift Tax (1954 Code) (26 C.F.R.):

* * * *

§ 25.2511-1 *Transfers in general.*

(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512-8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and ef-

fectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. In illustration, if Blackacre was devised to A under the decedent's will (which also provided that all lapsed legacies and devises shall go to B, the residuary beneficiary), and under the local law A could refuse to accept ownership in which case title would be considered as never having passed to A, A's refusal to accept Blackacre within a reasonable time of learning of the devise will not constitute the making of a gift by A to B. However, if a decedent who owned Greenacre died intestate with C and D as his only heirs, and under local law the heir of an intestate cannot, by refusal to accept, prevent himself from becoming an owner of intestate property, any gratuitous disposition by C (by whatever term it is known) whereby he gives up his ownership of a portion of Greenacre and D acquires the whole thereof constitutes the making of a gift by C to D.

* * * *

Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.):

§ 301.6501(e)-1 *Omission from return.*

* * * *

(b) *Estate and gift taxes.* (1) If the taxpayer omits from the gross estate as stated in the estate tax return, or from the total amount of the gifts made during the year as stated in

the gift tax return, an item or items properly includible therein the amount of which is in excess of 25 percent of the gross estate as stated in the return, or 25 percent of the total amount of the gifts as stated in the return the tax may be assessed, or a proceeding in court for the collection thereof may be begun without assessment, at any time within 6 years after the return was filed.

(2) For purposes of this paragraph, an item disclosed in the return or in any schedule or statement attached to the return in a manner sufficient to apprise the district director of the nature and amount thereof shall not be taken into account in determining items omitted from the gross estate or total gifts, as the case may be. Further, there shall not be taken into account in computing the 25 percent omission from the gross estate stated in the estate tax return or from the total gifts stated in the gift tax return, any increases in the valuation of assets disclosed on the return.

* * * * *

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